UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DANA CORPORATION
Employer
and **Case 8-RD-1976**

CLARICE K. ATHERHOLT
Petitioner
and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO ("UAW")
Union

METALDYNE CORPORATION (METALDYNE SINTERED PRODUCTS)
Employer
and **Cases 6-RD-1518**
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ALAN P. KRUG AND JEFFREY A. SAMPLE
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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO ("UAW")

BRIEF *AMICUS CURIAE* OF ASSOCIATED INDUSTRIES OF KENTUCKY

JAY W. KIESEWETTER
JONATHAN E. KAPLAN
TANJA L. THOMPSON
Kiesewetter Wise Kaplan
Schwimmer & Prather, PLC
3725 Champion Hills Drive, Suite 3000
Memphis, Tennessee 38104

Attorneys for Amicus Curiae
Associated Industries of Kentucky

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Associated Industries of Kentucky ("AIK") respectfully submits this brief as *amicus curiae* in response to the Board's June 7, 2004 Order Granting Review in these cases. (Bd. Order at 1).[1] This *amicus* brief focuses on the practical and legal effects of

[1] References to the Board's Order Granting Review will be cited as ("Bd. Order"); references to the Declaration of Clarice K. Atherholt in Support of her Decertification Petition will be cited as ("Atherholt Decl."); and references to the Declaration of Lori Yost will be cited as ("Yost Decl.").

the Board continuing to apply the voluntary recognition bar doctrine in light of today's labor relations and union organizing environment.

I. INTEREST OF THE *AMICUS CURIAE*

The Associated Industries of Kentucky is the Commonwealth's largest industrial trade association. Founded in 1911, AIK represents 3,000 member companies across the Commonwealth. AIK's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth, and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength. Virtually all of AIK's member companies are employers subject to the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. §§ 151 *et seq.* Some member companies employ union-represented employees and are subject to collective bargaining obligations under to Sections 8(a)(5) and 8(d) of the Act. Other member companies have been the targets of union organizing campaigns by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO ("UAW") and other labor organizations aimed at securing so-called "neutrality/card check" agreements through aggressive corporate campaigns.

Consequently, AIK's members have an acute interest in the issues raised by the Requests for Review in these cases. If the Board should adopt the rationale of the dissent in the Order Granting Review, such would effectively abdicate the Board's responsibilities under the Act and deny employees their Section 7 right to a free and fair choice of a collective bargaining representative. As employers of employees entitled to rights under Section 7 of the Act and targets of corporate campaigns and other coercive

tactics designed to pressure employers into "voluntary" recognition agreements, AIK members have a substantial and continuing interest in the important issues of Board law and policy raised in the Requests for Review.

II. ISSUES PRESENTED AND SUMMARIES OF PROPOSED CONCLUSIONS

Issue Presented:

> Should voluntary recognition bar employee-filed election petitions in situations where the union and employer enter into an agreement prior to the union having majority support that requires recognition on the basis of a card check?

Proposed Conclusion:

> *No. Under such circumstances, employees should be provided with an opportunity to demonstrate their support for or opposition to union representation in a Board-conducted secret ballot "RC" election.*

1st Related Issue Presented:

> In cases where the union and employer enter into an agreement prior to the union having majority support that requires recognition on the basis of a card check; (1) should the wording on the union's authorization card clearly disclose the finality of the card; and (2) should employees who sign cards be given an equally expeditious manner of revocation?

Proposed Conclusion:

> *Yes on both points. The wording on the authorization cards should clearly inform employees that the employer already has agreed to recognize the union on the basis of the cards without an election. Further, simultaneous with the presentation of the authorization card to an employee, the union should provide the employee with a revocation card and clear instructions as to how revocation of the authorization card may be effectuated.*

2nd Related Issue Presented:

> In *any* case where an employer voluntarily recognizes a union based on a card check, should employees be barred from obtaining and voting in a secret ballot Board-conducted election?

Proposed Conclusion:

No. Employees always should be provided an opportunity to demonstrate their support for or opposition to union representation in a Board-conducted secret ballot "RC" election.

III. FACTS, ISSUES, AND ARGUMENTS

A. The New Dynamics of Labor Relations and Union Organizing: Unions Circumvent the NLRB

1. Unions Take a Short-Cut to Organizing

In recent years, there has been a dramatic and troubling shift by unions in their approach to organizing. Instead of utilizing the Board's hallmark secret ballot election process, unions today are focusing their efforts on tactics that avoid the NLRB entirely – and the protections the Act provides for employee Section 7 rights. Thus, unions are shunning the open and healthy debate of issues and facts that occurs in pre-election campaigning under the watchful eye of the Board, as well as Board-conducted secret ballot elections. Instead, unions are putting their energies into one-sided, inherently coercive card signing activities – often conducted covertly and always outside of the NLRB's election safeguards – and then pressing for card checks and "voluntary" recognition based on these suspect card majorities.[2]

The rationale for this shift in strategy is clear – unions want to get new members and this is the most efficient way to achieve their objective.[3] Legitimate organizing is

[2] Unions argue that this strategy is legitimate because it falls under the guise of "voluntary" recognition – a concept that is not new to the Board or American labor relations. The fact is, however, that the labor relations landscape has changed dramatically since the Board's 1966 decision in *Keller Plastics*. *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966).

[3] So-called "top down" or "wholesale" organizing has become a business necessity for organized labor. For unions, the downward trend in membership and density since the 1970s is daunting. While one in four private sector workers belonged to unions in the mid-1970s, this ratio fell to less than one in 10 in the year 2000. In fact, "it is noteworthy that private sector union density

hard work – both intellectually and physically. And, having the issues and facts tested in an open debate during a pre-election campaign makes the process even more challenging. There is no doubt that it is easier for unions to organize when the only "facts" and information employees hear come from the union. It is hard to lose a one-sided debate. Deceptive tactics and misrepresentations of fact and law can go unrefuted in the context of card signing. Employees may even be misled into signing a card on the belief that the cards will be used to obtain an election where all employees will be able to vote their conscience.[4] Moreover, peer pressure, intimidation, harassment, and coercion can come into play in "no holds barred" card signing activities.[5]

Significantly, unlike the Board's secret ballot election processes, all of the union's card-signing efforts occur outside of the Board's purview. This makes it even more certain that the union will achieve its objective, i.e., getting a majority of employees to sign cards, regardless of how employees truly feel about the union, or how they might

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had fallen to a level in 2000 (9 percent) that was quite close to the density figure that existed exactly 100 years earlier at the start of the 20th century (7 percent)." *See* Bruce E. Kaufman, *The Two Faces of Unionism: Implications for Union Growth*, 23rd Economics Conference on "The Changing Roles of Unions" (Middlebury College Apr. 13-14, 2002).

No wonder that in defending today's "neutrality/card check" agreements, UAW President Ron Gettelfinger calls the card check process an "efficient procedure." *See* Ed Garston, *Feds May Stunt Union Organizing Campaigns*, The Detroit News (June 9, 2004); *see also Has the UAW Found a Better Road?*, Business Week Online (July 15, 2002) (discussing the UAW's new organizing campaign in the auto parts industry).

[4] Apparently, this occurred in at least one of the cases at bar. *See* Yost Decl., *see also* Section III(A)(3), *infra*.

[5] *See* Paul Kersey, *New Union Tactic Creates Problems for Workers*, The Detroit News (Jan. 6, 2004).

feel if they had the opportunity to hear all of the true facts and information about the relevant issues. [6]

But, simply obtaining authorization cards was not enough for unions. This only achieved part of their ultimate objective – quick recognition. Union organizers know that finding employees outside of work to convince them to sign cards is a time-consuming, inefficient process that can impede a union's drive for more members. What the unions really needed was a strategy to get employers to recognize them based on their "card majority," and at the same time make the whole card-signing process far simpler, more efficient, and more productive. Today, these concerns have been overcome in many sectors of the economy by unions' use of so-called "neutrality/card check" agreements, which unions have been wresting from employers through various coercive and sometimes unscrupulous means.[7]

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[6] One commentator had this to say about the detrimental effects of neutrality agreements:

> In the final analysis, neutrality agreements will often have the practical effect of imposing unionism on employees. This will result from the restrictions placed on the free flow of information under neutrality agreements from sources other than the organizing union, as well as from the very act of entering into an agreement with a union which has not obtained an uncoerced majority in the unit covered by that agreement. Thus, it seems that neutrality agreements conflict with the Act's underlying policy of preventing the imposition of unionism on employees.

Kramer, Miller, Bierman, *Neutrality Agreements: The New Frontier in Labor Relations – Fair Play or Foul?*, 23 Boston College L. Rev. 39, 79 (1981).

[7] *See* Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, presented to American Bar Association Committee on Development of the Law Under the National Labor Relations Act (American Bar Association 2000), at 3-6.

2. The Sticky Web of "Neutrality/Card Check" Agreements: Running Roughshod Over Section 7

To appreciate fully how employees are deprived of their rights when unions organize under these "neutrality/card check" agreements, it is important to understand the nature of those agreements and how they operate. The use of the word "neutrality" to describe today's agreements is a complete misnomer. They are in fact totally one-sided arrangements that not only demand that employers remain "neutral" (meaning "silent") about the union and its organizing activities, but often also require employers to assist the union in getting employees to sign cards. Significantly, these agreements do nothing to protect employee free choice. They are all about securing new members for unions and have nothing to do with ensuring that employees have a free and fair opportunity to select (or reject) a collective bargaining representative of their choice.

Minimally, "neutrality/card check" agreements require employers to remain "neutral" on issues involving the union and union representation, and to recognize the union if it can demonstrate that a majority of employees have signed authorization cards.[8] While these two concepts clearly would make it easier for unions to get cards signed, most unions have secured additional provisions in these "neutrality/card check" agreements that removes most of the work and uncertainty in their efforts to secure the required number of cards. Thus, many of the so-called "neutrality" portions of these

[8] Voluntary recognition today is not what it was 30, 20, or even 10 years ago. Today, "voluntary" recognition often comes as a result of card checks pursuant to these so-called "neutrality/card check" agreements. These agreements which often are forced upon employers deny employees the right to a secret ballot election and entirely circumvent the protections the Board has established for ensuring that employees are allowed to make their selection about union representation in a fair, informed, and uncoerced environment.

agreements also require employers to give the union significant access to employees on company premises and even on company time.

Additionally, these agreements frequently require employers to provide the union with all employees' names, home addresses and telephone numbers, departments, positions, lengths of service, etc., to facilitate the union's efforts to contact employees away from work. Moreover, some agreements prohibit employers from even correcting misrepresentations or factual errors or omissions made by the union. Most significantly, many such agreements actually require employers to advise their employees that they are "partners" with the union and/or that having the union would be beneficial for the company's business or help the company obtain new business and jobs.[9]

In short, employers are not simply required to remain "neutral," but rather, they must take affirmative steps to facilitate and even encourage the signing of union authorization cards.[10] Clearly, this "encouragement" does not conform to the rules Congress enacted to protect employee rights to choose freely in a secret ballot election.[11] This becomes a serious problem if the "encouragement" takes the form of subtle threats of plant closings, job loss, or mistreatment, or with promises of favorable treatment, new work,[12] or even special rights. And, regardless of how the signed cards are obtained, the

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[9] *See* Cohen, *Neutrality Agreements*, supra, n.7.

[10] Clearly, many of the initiatives required of employers under these "neutrality/card check" agreements run afoul of Section 8(a)(2) of the Act. However, since the cases at bar are representation cases, discussion of the significant unfair labor practice aspects these "neutrality/card check" agreements is beyond the scope of this brief.

[11] *See* Jarol P. Manheim, *The Death of a Thousand Cuts, Corporate Campaigns and the Attack on the Corporation*, Lawrence Erlbaum Associates, Mahway, NJ & London (2001), at 38-39.

[12] An example of an implied promise of more work (or a veiled threat of fewer jobs) apparently occurred in the cases at the bar. *See* Atherholt and Yost Decls.

company is required to recognize the union as the exclusive bargaining representative of the employees under the terms of the "neutrality/card check" agreement – without challenging the integrity of the manner in which the cards were obtained. One thing is certain – employee rights are not protected in this process and, given the circumstances under which the cards are signed, employee signatures on the cards are not a valid indicator of their desire for union representation. Cards signed under these circumstances simply cannot be deemed to fairly and accurately reflect the free choice of employees.

Significantly, the "gag order" provisions that today's neutrality agreements impose on employers ensure that employees will only hear one side of the issues involved in union representation – the union's story. The free debate that allows employees to discern truth from falsity in campaign propaganda, as well as the ability to make an informed and uncoerced decision about union representation, is totally eliminated.[13]

Finally, today's "neutrality/card check" agreements often include provisions governing collective bargaining, such as the timing of bargaining, deadlines for reaching an agreement (usually several months after recognition), and mandatory interest arbitration if necessary to determine the terms of the contract. [14]

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[13] As John Lawler notes:

> Although corporate campaigns may prove to be quite effective in organizing drives, it is not clear that fundamental public policy objectives are always well served through the use of this method. Neutrality agreements obtained by coercive means may eliminate egregious employer misconduct. Yet employee free choice would also be hampered by a complete absence of employer involvement in campaigns.

John J. Lawler, *Unionization and Deunionization Strategy, Tactics, and Outcomes*, 232 (Univ. of South Carolina Press 1990).

[14] For example, in one situation involving a "neutrality/card check" agreement, the parties negotiated first contracts at nine newly recognized facilities in less than 30 days from the start of

3. Real-Life Examples: The Facts in the Cases at Bar

The instant cases are no exception to the trademark abuses of employee rights that are found in many of today's "neutrality/card check" arrangements. In the instant cases, employees at both the Dana Upper Sandusky, Ohio plant and the Metaldyne St. Mary's, Pennsylvania plant were effectively forced into accepting union representation after the UAW colluded with their respective employers to coerce them into signing authorization cards and accepting union representation without any of the procedural safeguards of an NLRB secret ballot election.[15] (Atherholt and Yost Decls.)

As under many "neutrality" agreements, the UAW was given broad access to the employers' facilities, as well as access to personal information of employees, including their home addresses. (Atherholt and Yost Decls.). When UAW organizers were unsuccessful in signing up some employees during the work day, they visited them at home to try to convince them to sign cards. (Atherholt and Yost Decls.). In short, employees' rights were severely trampled as UAW organizers did everything they could – exerting continuous pressure – to force employees to sign union authorization cards, thereby accepting union representation. (Atherholt and Yost Decls.).

Both employers and the UAW also worked collaboratively through captive audience meetings to encourage employees to sign cards. (Atherholt and Yost Decls.). During the Dana meetings, company and UAW officials misled employees by telling them that they had entered into a "partnership" that would be beneficial to getting new business from the "Big Three" automotive manufacturers. (Atherholt Decl.). The clear

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negotiations. UAW Solidarity, *New Strategies Win Good First Contract Fast*, (March/April 2004), available at http://www.uaw.org/solidarity/04/0304/feature04.cfm.

[15] Significantly, at the Dana plant these events occurred only one year after employees had *rejected* the union in a Board-conducted secret ballot election.

implication to employees was that they would lose work opportunities if they did not cave in to the demands of union organizers and agree to sign authorization cards. (Atherholt Decl.). During the Metaldyne meetings, the Company ran a video telling employees that they needed to accept the UAW into the plant and that it was a "win-win situation" for everyone. (Yost Decl.).

The details of the "neutrality" agreements were kept secret from employees, and many employees did not understand that they would not have an opportunity to vote in a secret ballot election or that their signatures on the union's authorization cards were the single and final step to UAW representation. (Atherholt and Yost Decls.). After the union obtained signatures from a majority of employees the UAW was automatically recognized pursuant to the terms of the "neutrality/card check" agreements. The end result was that many employees were "shocked" that they had been denied the right to a secret ballot election and that the UAW was "thrust upon them" in this manner. (Yost Decl.).

In addition to denying employees the right to vote in a secret ballot election, at the Metaldyne facility, the company and the union collaborated to configure a bargaining unit that would ensure the UAW's success in a card check. (Yost Decl.). For example, departments such as quality and the tooling machine shop were split apart so that only employees who supported the union were included in the bargaining unit. (Yost Decl.). This outrageous gerrymandering of the bargaining unit only served to further frustrate employee rights under the Act.

4. Unions' Corporate Campaign Tactics and Their Success with Top Down Organizing

Unions have forced employers to enter into these "neutrality/card check" agreements by attacking them with comprehensive public relations and legal "corporate campaigns" designed to damage the employer's name, business relations, community support, and customer and/or investor relations. They also have achieved their objective by pressuring key customers to the point that the employer fears serious negative business repercussions if it fails to resolve its "dispute" with the union, and by pressuring employers with strikes at their union-represented facilities thereby holding the employer's business hostage.[16]

The reality of labor's new organizing model is that unions are not spending their time trying to convince more *employees* that unions are a positive thing. Rather, they have taken a short-cut to organizing by engaging in aggressive and sometimes defamatory and destructive "corporate campaign" tactics to bring increasing pressure on *employers* to agree to "neutrality/card check" agreements that will do the organizing work for them.[17]

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[16] *See* Ed Garsten, *Feds May Stunt Organizing Campaigns*, The Detroit News (June 9, 2004) and David Denholm, *Top Down Organizing by the UAW* (The Smith Center for Private Studies) (UAW wants Big Three automotive manufacturers to pressure their suppliers to "turn over" their employees to the union through "neutrality/card check" agreements); s*ee also Labor Policy Association, "Testimony of Daniel V. Yager, Senior Vice President and General Counsel, LPA, Before the U.S. Senate Health, Education, Labor & Pensions Committee,"* Hearing on Workers' Freedom of Association: Obstacles to Forming a Union (June 20, 2002).

[17] This laziness on the part of unions flies in the face of their own research. Union organizers know that individual, face-to-face communication with employees is the union's best recruiting tactic. According to one survey, when an organizer makes house calls on 60-75 percent of the petitioned-for unit, the union's win rate is 78 percent compared to a 41 percent win rate with no house calls. *See* Virginia Diamond, *Organizing Guide for Local Unions*, at 28 (George Meany Center for Labor Studies/Labor's Heritage Press 1992). The importance of personal interaction has been confirmed by several studies. According to one researcher, "[u]nions are more likely to win when they run aggressive and creative campaigns utilizing a grass roots, rank-and-file

Organized labor's philosophy in the 1990s became, "Employees are complex and unpredictable. Employers are simple and predictable. Organize employers, not employees."[18] Unions thus have turned to organizing entire employers, not just employees in a given facility, in a top-down, "wholesale" approach that includes "neutrality" and card check recognition as the primary organizing strategy.

The "corporate campaign" was defined in the late 1990s as

> a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. The tactics may include, but are not limited to, litigation, political appeals, requests that regulatory agencies investigate and pursue [alleged] employer violations of state or Federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public.[19]

Since that time, the tactics unions use in corporate campaigns and top-down organizing have only become more egregious.[20]

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intensive organizing strategy . . . [T]he primary focus of the campaign needs to be person-to-person contact." Kate Bronfenbrenner & Tom Juravich, *Seeds of Resurgence: The Promise of Organizing in the Public and Private Sectors*, Institute for the Study of Labor Organization Working Papers (March 1994), at 3. Instead of putting in the hard work needed to communicate their message persuasively to employees that unionization is in their best interest, unions today are bypassing employees and concentrating on securing secret agreements with their employers that require the employers to virtually turn their employees over to the union.

[18] *See* Manheim, *Death of a Thousand Cuts* at 37-38.

[19] *Food Lion v. UFCW*, 103 F.3d 1007, 1014 (D.C. Cir. 1997).

[20] Perhaps the best example of today's corporate campaign is the one being carried out jointly by UNITE and the Teamsters against Cintas Corporation. The Cintas campaign has become the hallmark for the modern "corporate campaign." Significantly, UNITE President Bruce Raynor admitted that Cintas' employees have voted against unionization in 39 different secret ballot elections. This time around, the unions are engaging in a massive corporate campaign in an attempt to force Cintas to agree a "neutrality/card check" agreement. *See* Michelle Amber, *AFL-CIO Convenes Organizing Summit to Find New Ways to Expand Membership*, Daily Labor Reporter Online (Bureau of National Affairs Jan. 14, 2003). Raynor also indicated at the January 2003 AFL-CIO Organizing Summit that the unions' multi-million dollar corporate campaign against Cintas is designed to destroy the company if it refuses to let its employees become unionized without a secret ballot election. *See* http://lists.iww.org/pipermail/iww-news/2003-January/001065.html.

An employer under attack by a corporate campaign often finds itself in an untenable position with no good course of action to follow. The employer can either hold fast to its principles and allow the union to destroy its business and the jobs the business provides, or the employer can capitulate and give the union what it wants – the "neutrality/card check" agreement. This has been a gut-wrenching choice for many companies who have worked hard to create open and positive work environments, and invested heavily in value-driven, positive personnel programs that have built strong bonds of mutual trust and respect with their employees. On one hand, these companies know that by capitulating to the union's demands they may save the overall business and financial security of their employees whose jobs depend on the success of that business – at least temporarily.[21] On the other hand, they also know that by "serving up" their employees to the union on a silver platter – without any regard for protecting employee rights to make a free, fair, and informed decision on union representation – they are

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Other examples of corporate campaigns in recent years include: (1) *Beverly Enterprises:* healthcare and nursing home company resistant to top-down organizing efforts of SEIU and UFCW – the unions use allegations of patient abuse and negligence to sway public opinion against the corporation; (2) *Food Lion:* grocery store chain resistant to top-down organizing efforts by UFCW – union uses allegations and video coverage of health and safety concerns to pressure company and sway public opinion; (3) *Catholic Healthcare West:* Catholic hospital and healthcare company resistant to SEIU efforts to use religious idealism to claim the company does not follow policies Catholicism dictates that workers must have a just workplace – union stretches claim by saying it is impossible to have a just workplace without unionization; and (4) *New Otani Hotel:* Los Angeles Hotel refuses to sign the city's standard agreement for hotels with HERE – union alleges discrimination against Hispanic and female employees to paint the picture of an unfair employer and disrupt hotel business. Manheim, *Death of a Thousand Cuts* at 69-71, 74-78, 80-82, 200. *See also* Andy Meisler, *A High Stakes Union Fight: Who Will Fold First*, Workforce Management (January 2004), at 28-38.

[21] In many cases, the promised long-term financial and job security is illusory as, once entrenched, the union/employer "partnership" often is not beneficial to the company's business and actually does more harm than good as unions focus only on their own interests, not those of the employer or employees.

betraying the trust those employees placed in them. For many employers, even though they saw no better course of action under the circumstances, caving-in to the union's "neutrality/card check" agreement and force-marching their employees into compulsory unionism, has been a bitter pill to swallow. But, when an economic gun is pointed at one's head, there often are few options.

Unions claim such aggressive campaign tactics are necessary in the face of declining union membership, and they argue that the reason union membership has declined over the last 25 years is because of employer opposition to unionization.[22] In this regard, unions argue that most employers engage in illegal practices such as firing union supporters. Yet, the facts are that only a very small fraction of NLRB elections involve objections alleging campaign irregularities.[23]

Noted labor economist Leo Troy rejects altogether the premise that the decline of union membership can be attributed to employer opposition. Instead, Troy contends that the decline is the result of structural factors in the economy. Because union membership losses are "huge," falling from 35.7 percent of the nonagricultural workforce in 1953 to less than 12 percent by 1990, election defeats cannot account for this decline. Troy

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[22] Unions also claim that these tactics are necessary because of the burdens placed on them by the Board's slow process. In reality, however, unions know they have a much better chance of succeeding when employees do not get to hear both sides of the issues and do not have the option of making their choice about union representation in the privacy of a voting booth. Moreover, the average length of time from filing of a petition to a vote has decreased significantly over the years. Thus, blaming the Board for a lack of expediency is a canard – this is not what has truly prompted unions to short-cut the NLRB election process.

[23] Responding to a question from the National Institute for Labor Relations Research, then NLRB Information Director David Parker wrote in a July 16, 2003 letter that "[a] review of elections since 10-1-99 shows that of a total of 14,078 [NLRB-sponsored union certification and decertification] elections held, 448 or 3% involved objections. About half of the objections (225) were filed by unions or an intervenor (13), while 223 were filed by employers."

argues that this change is explained by a shift from a goods-dominated economy to a non-union service-dominated economy. International competition has eviscerated the core manufacturing sector in the U.S., reducing unionized employment. Data reveal that between two-thirds and three-fourths of both Canadian and American workers would not vote for union representation in a secret ballot election. Consequently, Troy concludes that it is *employee*, rather than employer, opposition to unions that is the important point.[24]

Princeton economists Henry Farber and Alan Krueger identify the job satisfaction level of non-union employees as the principal factor explaining the decline in union density. Farber and Krueger found that:

> [V]irtually all of the decline in unionization between 1977 and 1991 seems to be due to decline in demand for union representation. There is no evidence that any significant part of the decline in unionization is due to increased employer resistance other than the sort of resistance that would be reflected in lower demand for unionization by workers.[25]

Illustrating the continuing nature of this decline is the fact that during the 1992-99 economic boom, when non-union manufacturing jobs grew by 6.9 percent, unionized jobs

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[24] *See* Leo Troy, *Market Forces and Union Decline: A Response to Paul Weiler*, 59 U. Chi. L. Rev. 681 (1992); Leo Troy, *Is the U.S. Unique in the Decline of Private Sector Unionism?* 11 Journal of Labor Research 111 (1990). *See also* Bruce E. Kaufman, *The Two Faces of Unionism: Implications for Union Growth*, 23rd Economics Conference on "The Changing Roles of Unions" (Middlebury College Apr. 13-14, 2002) (discussing market forces and changes in employee attitudes as reasons for continuing decline in union membership).

[25] Henry S. Farber & Alan B. Krueger, *Union Membership in the United States: The Decline Continues, in Employee Representation: Alternatives and Future Directions* 105, at 118 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993).

in the manufacturing sector fell by 19.1 percent.[26] Even more telling is the fact that UAW membership has declined by half, from 1,260,000 in 1955 to 624,585 in 2003.[27]

Samuel Estreicher notes that something more fundamental than simple employer opposition to unionism is at work. He points out that the conflicts of interest between labor and management, and hence the incentive to economize on labor costs, have been with us since the passage of the NLRA. American managers have never welcomed unions, he writes, and yet unions grew from 1935 to 1954, but have declined ever since. Why? Professor Estreicher's answer reflects the new reality of the global marketplace:

> The change in labor-management relations, and the relative position of unions, is essentially due to an unleashing of competitive forces in the markets for American products and services. Given a large domestic market and barriers to entry in many industries, unions for many years were able to pursue traditional high-labor-cost policies across entire product markets and thus grow or at least maintain their positions despite hostile, or at least grudging, managements and relatively toothless labor law. As we enter an era of intense product market competition, however, the underlying strains in the system are now apparent.[28]

Regardless of the true nature of their motivation, unions have learned that they can be very successful in gaining new members by pressuring employers into "neutrality/card check agreements" and ignoring employees' rights to a free and fair choice of representation. Studies show that the joint objectives of "neutrality" and card check recognition significantly increase union "win rates" in organizing. A 1999 internal AFL-CIO study found that although unions win only about half of all NLRB secret ballot

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[26] Barry T. Hirsch & David A. Macpherson, *2003 Union Membership and Earnings Data Book* 14 (Bureau of National Affairs 2003).

[27] *Directory of U.S. Labor Organizations: 2003 Edition* (Court Gifford ed., Bureau of National Affairs 2003).

[28] Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 Chi.-Kent L. Rev. 3, 10 (1993).

elections, unions are successful nearly 80 percent of the time in card check campaigns.[29] In fact, the AFL-CIO estimates that the *vast majority* of current private sector organizing is done through card check/neutrality agreements, and that most new employees organized since the late 1990s have never been given the opportunity to vote in an NLRB-conducted secret ballot election. AFL-CIO Secretary/Treasurer Richard Trumka reported that only about 20 percent of new union members in 2002 were organized through secret ballot elections.[30] Because of union's great success in recent years through taking the short-cut of employer coerced "neutrality/card check" agreements at the expense of employee rights, they are not apt to turn back now and reflect upon the trodden rights of employees unless forced to do so.

B. The Tensions Created and Issues Raised by the New Dynamics

1. Organizing Objectives v. Employee Rights

While achieving the unions' institutional goal of increasing their membership, this new organizing model has created serious tension in American industry and *vis a vis* the National Labor Relations Act. First, by designating a particular union as the "favored" labor organization with the employer by adopting the "neutrality/card check" agreement, employees are completely deprived of the opportunity to select their own union from a wide field of possible options. That choice has been pre-selected for them by the union

[29] *Labor Policy Association, "Testimony of Daniel V. Yager, Senior Vice President and General Counsel, LPA, Before the U.S. Senate Health, Education, Labor & Pensions Committee,"* Hearing on Workers' Freedom of Association: Obstacles to Forming a Union (June 20, 2002).

[30] Phil Wilson, *Reversing Union Neutrality*, Labor Relations Ink (October 2003), at 4.

and the employer. This concept is completely at odds with the Act and the history of labor relations in the United States.[31]

Second, the fact that employees are required to attend union card signing meetings while at work and listen to the union's organizers pitch the union at lunch, work breaks, and in the cafeteria and parking lot before and after work puts undue pressure on employees and creates a situation not anticipated by the NLRA's election procedures.[32] This is especially true when their employer already has announced its "partnership" with the union. Further, the basic validity of cards that are signed in a large group setting, or even in front of several co-workers or union officials, is highly questionable. Peer pressure, intimidation flowing from the setting in which the employee must make his/her decision, and fear of reprisal or retaliation all come into play. The stress and anxiety resulting from this situation can be especially pronounced since employees know that the union already has their home addresses and telephone numbers. Indeed, a "home visit"

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[31] For example, Section 7 of the NLRA guarantees employees "the right to *self-organization*, to form, join or assist a labor organization, to bargain collectively *through a representative of their own choosing* . . . and . . . the right to refrain from any or all of such activities." 29 U.S.C. § 157. (emphasis added).

[32] As noted previously, such examples of employer assistance to the union may well violate Section 8(a)(2) of the Act, and certain actions by the union in obtaining signatures on its cards may violate Section 8(B)(1)(a) of the Act. *See Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961) (employer violates Section 8(a)(2) by recognizing a union that does not represent an uncoerced majority of employees or if the employer renders other unlawful support, even if such employer actions are taken in good faith). Seeking a remedy under the unfair labor practice sections of the Act may halt such improper and unlawful conduct. However, it will not remedy the fact that the victimized employees have been denied access to basic information and facts needed to be able to make an informed decision, have been pressured into signing the cards, and have been denied a secret ballot election where their selection or rejection of union representation could be made in a free and fair manner without fear of reprisal or retaliation. Pursuing unfair labor practices may be helpful in halting unlawful conduct and bringing the violators to task, but only a change in the election bar rule in cases of voluntary recognition will provide relief for employees who have been summarily whisked into a representational relationship with a blatant disregard of their Section 7 rights and have no ability to obtain a Board-conducted secret ballot election to determine the true nature of the purported majority support the union claims.

by the union's organizing team can be particularly upsetting and intimidating to some employees.[33]

The most serious source of tension, however, flows from the absence of a secret ballot election. As discussed in detail elsewhere in this brief, it cannot be seriously disputed that the secret ballot election clearly is the best method for determining the free and fair choice of individuals making a group decision, whether it be in a political or labor relations setting.[34] However, with "neutrality/card check" agreements, the union and employer have slammed shut the door on the possibility of a secret ballot election long before employees are ever approached by the first union organizer.

Moreover, this pre-existing agreement between the union and employer has stacked the deck against employees truly exercising their own free will in choosing whether or not to be represented by the union. To the contrary, the "neutrality/card check" agreement virtually preordains the outcome. Thus, the union and employer have pre-selected the preferred union, and then orchestrated a deliberate and tightly controlled process and procedure to influence employees to sign authorization cards for the union.

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[33] The privacy and anonymity of the Board's secret ballot election process provides important checks against such coercion and against a person being forced, lured, or intimidated into voting one way or another. The free and secret ballot used in the United States and most other democratic countries is one of the chief protections of voters and their right of choice. The introduction of the "Australian" or secret ballot voting procedure in the 1890s finally made elections genuinely secret. *See Election 2004: The Electoral Process in the United States – The Secret Ballot* (Scholastic Web Site, 2004), available at http://teacher.scholastic.com/activities/election2004/process_democracy.htm; *see also* U.S. Government Publication, *What is Democracy?* available at http://usinfo.state.gov/products/pubs/whatsdem/whatdm5.htm (stating that "[e]lections are the central institution of democratic representative governments [and] [t]o cast a free ballot and minimize the opportunity for intimidation, voters in a democracy must be permitted to cast their ballots in secret.").

[34] *MGM Grand Hotel, Inc.*, 329 NLRB 464, 474 (1999) (Member Brame dissenting) (secret ballot elections are the Board's crown jewel); *Brooks v. NLRB*, 348 U.S. 96, 99-100 (1954) (noting that a decertification petition in which "the influences of mass psychology are present—is not comparable to the privacy and independence of the voting booth").

Then, once a majority of employees has signed cards, the employer is required to recognize the union – without an election or any of the procedural safeguards associated with the Board's election processes. Indeed, with one of these agreements in place, union organizing becomes less of an effort at skillful communication and salesmanship, and more akin to shooting fish in a barrel.

But, it does not end there. Many of these "neutrality/card check" agreements also contain provisions that require the union and employer to have a collective bargaining agreement in place within a few months of recognition,[35] which further impacts the rights of employees. Thus, employees initially are denied the right to a secret ballot election on the issue of representation – and, under the Board's current recognition bar rule, have no opportunity to "decertify" the recognized (but uncertified) union for a reasonable period of time – usually one year. But then, if the union and employer quickly enter into a contract during that "reasonable period of time" (as is required by some "neutrality/card check" agreements), then the Board's contract bar rule kicks in and employees are barred from having an election for the duration of the contract up to three years. As such in reality the "reasonable period" recognition bar in many of these cases turns out to be three or four years in length.

Such a grossly unfair and unconscionable result was never contemplated by the Act. For example, Section 7 of the NLRA guarantees employees

> ... the right to self-organization, to form, join or assist labor a organization, to bargain collectively through a representative of their own choosing ... and ... the right to refrain from any or all of such activities … .

[35] *See* Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, presented to American Bar Association Committee on Development of the Law Under the National Labor Relations Act (American Bar Association 2000), at 3-6.

Moreover, Sections 8(a)(1) and 8(B)(1)(A) of the Act protect these rights from restraint or coercion by either unions or employers. In other words, the Act assures employees that they have the right to freely and fairly make up their own minds as to whether they do or do not want union representation – and if they are inclined toward a union, they also have the right to decide which union they want.[36] The problem is that unions today are utilizing "neutrality/card check" agreements to achieve their own institutional organizing goals at the expense of these fundamental employee rights.

2. The New Dynamics, Workplace Stability and the Relevance of the NLRB

There is no doubt that employees who did not want a union when it is "voluntarily" recognized may feel as though they were railroaded into union representation. They may perceive that they were snared in a trap jointly set by the union and employer under a secret deal cut behind their backs with no real "say" in the matter. Feelings of anger, betrayal, confusion, and helplessness would likely pervade such an environment. An atmosphere poisoned with such negative feelings, distrust, resentment, and even hostile resistance to both the union and employer is not in the best interest of

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[36] Neutrality agreements also do not promote the "complete and unfettered freedom of choice" that Congress sought to guarantee by enacting Section 8(a)(2) of the Act. *See NLRB v. Link-Belt Co.*, 311 U.S. 584, 588 (1941). On balance,

> neutrality agreements go beyond mere cooperation between labor and management, and represent unlawful employer support of union organizing efforts in violation of Section 8(a)(2). In addition to the problems posed under Section 8(a)(2), neutrality agreements also violate other sections of the NLRA. Such agreements adversely affect the free speech rights accorded to employers under Section 8(c), the right to vote in free and open representation elections guaranteed to employees by Section 7, and the right of employees to be free from imposed unionism.

Kramer, Miller, Bierman, Neutrality Agreements: The New Frontier in Labor Relations – Fair Play or Foul?, 23 Boston College L. Rev. 39, 71-72 (1981).

either the union or employer. It certainly does not provide a solid foundation for a new labor-management relationship. Clearly, such a situation is not a goal or objective of the Act – indeed, it is the antithesis of stable labor relations.[37]

The Board must address and correct this situation, otherwise many more employers will likely conclude that to successfully operate their businesses, they must capitulate and help unions achieve their objective of increasing union membership, even at the expense of their employees' rights. Employers may agree to remain silent during a union organizing effort while the union misleads their employees. They may agree to allow unions to hold captive audience meetings with their employees on company premises and during working time to encourage card signing. They may agree to recognize only the particular union that is exerting pressure on them. They may give the union private employee information to facilitate the union's organizing efforts. They may keep their agreement with the union secret so that employees cannot make an informed decision about card signing. They may also allow their employees to be swept up by the union even though the employer knows most of its employees would prefer to remain union-free. These are the types of dangers that the Board must step in to prevent – dangers that are present when unions and employers who have been coerced into cooperating with them reach the point of colluding with one another to deny employees their fundamental right to a free and fair choice regarding union representation.

[37] The goal in the labor-management relationship is stability derived from the right of employees to make a free and uncoerced decision regarding representation. *General Shoe Corp.*, 77 NLRB 124, 126 (1948).

C. The Value and Importance of Secret Ballot Elections

1. The Keystone of Group Decision-Making in Modern Democracies

Voting in a free secret ballot election is the one democratic process that political theorists universally recognize as essential, because without the right to vote, all other forms of group decision-making become virtually meaningless. As Robert Dahl writes:

> [a]t the decisive stage of collective decisions, each citizen must be ensured an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by other citizens. In determining outcomes at the decisive stage, these choices, and only these choices, must be taken into account.[38]

The right to vote in a free secret ballot election, however, is not the sole criteria necessary for democratic decision-making. The deliberative process also is essential. Deliberation involves "a careful examination of a problem or issue, the identification of possible solutions, the establishment or reaffirmation of evaluative criteria, and the use of these criteria in identifying an optimal solution."[39]

During a union organizing campaign, individual choices regarding participation and unionization undergo continual reevaluation up to the election itself. Throughout the campaign, *both* the union and employer expose employees to information designed to influence their decisions about representation. Employees weigh these election materials and tactics to ascertain the "efficacy" of voting one way or the other. As one

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[38] Robert Dahl, *Democracy and Its Critics* 111 (Yale Univ. Press 1989).

[39] John Gastil, *Democracy in Small Groups: Participation, Decision Making and Communication*, 24 (New Society Publishers 1993).

commentator noted, "[a] free election is more than a contest for the voter's preference; it is the *process* upon which representative collective bargaining depends."[40]

Additionally, it is well-established that the secret ballot election is the best method to ensure that voters can freely express their position without intimidation, coercion or fear of reprisal. Indeed,

> [w]hile not without flaws, the best way for resolving the question of representation continues to be by employees expressing their opinion in a secret ballot election conducted by the National Labor Relations Board. ... The secret ballot election process . . . guarantees confidentiality and protection against coercion, threats, peer pressure, and improper solicitation and inducements by either the employer or the union.[41]

Accordingly, the right to deliberate followed by the secret ballot election is the foundation of modern democratic decision-making. This process also is at the core of each employee's Section 7 rights.

Why then, is organized labor afraid of the free exchange of ideas and the secret ballot election? As former Justice Harry Blackmun noted:

> information is not in itself harmful, [] people will perceive their own best interest if only they are well enough informed, and [] the best means to that end is to open the channels of communication rather than to close them.[42]

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[40] Bernard Samoff, *NLRB Elections: Uncertainty and Certainty*, 117 U. Pa. L. Rev. 228, 251 (Dec. 1968) (emphasis added).

[41] *Labor Policy Association, "Testimony of Daniel V. Yager, Senior Vice President and General Counsel, LPA, Before the U.S. Senate Health, Education, Labor & Pensions Committee,"* Hearing on Workers' Freedom of Association: Obstacles to Forming a Union (June 20, 2002).

[42] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (Justice Blackmun).

Labor unions are afraid of democratic decision-making for one reason – it has not resulted in as many new members as they desire.[43] For this reason, union organizers are increasingly turning to a different process – other than democratic decision-making – that denies employees the right to freely consider all points of view and bars their right to vote in a secret ballot election. Unions needed a process that gave them absolute control over the information employees receive and required employees to demonstrate their sentiments on union representation in a public, coercive setting. They wanted a process that would eliminate the risk and *ensure* the numbers of new members they want (and need). Pre-recognition "neutrality/card check" agreements with employers are just the solution.

2. The NLRB's Secret Ballot Election Procedure: The Crown Jewel of American Labor Relations

a. Protecting Employee Rights and Ensuring the Free, Uncoerced Expression of Employee Sentiment Regarding Union Representation

In the Taft-Hartley amendments of 1947, Congress set forth an evenhanded approach to the regulation of labor-management relations. One of the lynchpins of this new approach was Congress' amendment of Section 7 of the NLRA, which added to the original language of Section 7 the proviso that employees "shall also have the right to refrain from any and all such activities."[44] Congress thus made it clear that it is not

[43] Many employees weigh the pros and cons of joining a union and decide that it is not for them. Quite simply, "representation is not always the right choice for workers; if it were, the law would simply mandate a union for every plant." Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 Chi.-Kent L. Rev. 3, 31-32 (1993).

[44] 29 U.S.C. § 157. Congress also made it an unfair labor practice for unions to force unionization on employees. 29 U.S.C. § 158(b)(1).

unionization that is important, but rather that individual employees have complete freedom either to join or not to join unions as they so desire.

Today's "neutrality/card check" agreements clearly intrude upon employees' Section 7 rights. Unions and employers are acting solely on their own self-interested motives when entering into such neutrality agreements – not the interests of employees. This flies in the face of the overriding purpose of the Act; to guarantee employees a free and untrammeled choice that is uncoerced, reasoned, and thoughtful.[45] As Senator Wagner stated during the debates on the Wagner Act, "[t]he free choice of the worker is the only thing I am interested in."[46] When activities, even if not constituting unfair labor practices, create an "atmosphere" which prevents "a free and untrammeled choice by the employees," that choice must be invalidated.[47]

The use of "neutrality/card check" agreements undercuts the freedom of choice and individual employee rights which are the cornerstone of the representational system established by the Act. It therefore is essential that the rights of employees to choose freely not be sacrificed to the notion of expediency or a desire to assist unions in improving their membership levels. As former Member Brame noted in his dissent in *MGM Grand Hotel*:

> Employees' Section 7 rights comprise the core of the Act and, in applying the balancing process, the Board must show a special sensitivity toward employees' rights. Sadly, my colleagues in the majority have abandoned employees' Section 7 rights in favor of "industrial stability," and, in the process, have enabled the Employer and the Union to deprive employees

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[45] *General Shoe Corp.*, 77 NLRB 124, 126 (1948).

[46] *Legislative History of the National Labor Relations Act of 1935*, 440 (1935).

[47] *General Shoe*, 77 NLRB at 126 (applying rule to representation election).

> of their right to decide, in a secret-ballot election, whether to retain the Union as their collective-bargaining representative.[48]

When balancing these interests, employee free choice far surpasses the right of employers and unions to enter into pre-recognition "neutrality/card check" agreements.[49]

b. The Preferred Method of Determining the Legitimacy of Union Majority Status

Card check agreements not only deny employees the right to a secret ballot election, but also they entirely circumvent the protections the Board has established for ensuring that employees are allowed to make their selection about union representation in a fair and informed environment.[50] Employee signatures on cards simply are not a valid or accurate indicator of employee desires for union representation, and cards signed in the presence of union organizers or pro-union co-workers cannot be deemed to fairly and accurately reflect the free choice of employees.[51]

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[48] *MGM Grand Hotel, Inc.*, 329 NLRB 464, 472 (1999) (Member Brame dissenting).

[49] If unions are concerned about industrial stability and want to ensure that they have sufficient time to prove themselves before being subject to a decertification election, they always have the option of filing a certification petition at the outset instead of relying on a card check agreement and "voluntary" recognition. Then the election bar will be in place and they can pursue contract negotiations uninterrupted for a one-year period.

[50] As the authors of a law review article on neutrality agreements note:

> The group that loses the most when neutrality agreements are entered into are the individual employees. They are the least powerful of the relevant groups and have no say in the decision to enter into such agreements. Neutrality agreements prevent employees from getting the full story during an election campaign. Ultimately, under neutrality agreements, the choice to be represented by a union is not really a free and informed one as envisioned by the drafters of the NLRA.

Kramer, Miller, Bierman, *Neutrality Agreements: The New Frontier in Labor Relations—Fair Play or Foul?*, 23 Boston College L. Rev. 39, 79 (1981).

[51] A study by Marcus Sandver determined that union authorization cards are "a relatively poor indicator of union success in elections." According to his research:

The question as to whether authorization cards are a "reliable" indicator of union sentiment has been the topic of frequent and ongoing debate. Many factors account for the reasons why employees decide to sign authorization cards. The most obvious is the individual employee's genuine interest in union representation. Yet, this is not the only reason. For persons who are undecided or even against union representation at the time they are asked to sign a card, a signature may still be obtained if, for example, peer pressure, coercion, or intimidation are utilized. Other negative reasons also may be involved, such as the misleading language of the authorization card itself.[52]

During the extensive debate in the 1960s over whether union authorization cards are a reliable indicator of a union's majority status, then Board Chairman McCullock gave an often-cited speech noting the statistical unreliability of authorization cards. He pointed out that in 58 representation elections unions presented authorization cards from 30 to 50 percent of the employees, but won only 19 percent of those elections. In 87 representation elections, unions presented authorization cards from 50 to 70 percent of the employees, but won only 48 percent of those elections. In 57 representation

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> the evidence presented here demonstrates rather conclusively that the union's chance of winning an authorization election is only about 9% greater in units where it had a majority of authorization signatures than in those in which it did not. . . . [T]he data indicates that in over 25% of the total elections studied, [automatic certification based on a 55 percent showing of interest] would have produced a certification for the union which would not have been achieved through the election process.

Marcus Hart Sandver, *The Validity of Union Authorization Cards as a Predictor of Success in NLRB Certification Elections*, Labor Law Journal 696, 702 (Nov. 1977).

[52] *See* B. Ruth Montgomery, *The Influence of Attitudes and Normative Pressures on Voting Decisions in a Union Certification Election*, 42 Indus. & Lab. Rel. Rev. 262, 277 (Jan. 1989) (finding considerable support for proposition that pressures from co-workers and family members influence voting intention); Note: *Union Authorization Cards*, 75 Yale L. J. 805, 823-28 (1966) (solicitation of cards is more open to subtle pressures and fraud than elections, and the result is thus less likely to reflect the actual wishes of the workers).

elections, unions presented authorization cards from over 70 percent of the employees, but proceeded to win only 74 percent of those elections.[53]

Social research of group behavior "strongly supports the belief that individual perceptions and opinions are shaped (or reshaped) substantially by the perceptions and opinions of others within a group."[54] Research also indicates that "as group motives and goals form, there is a strong pressure for conformity and consensus."[55] Moreover, employees often sign cards (even when properly worded) under the mistaken impression that they are merely authorizing an election or simply to avoid a personal encounter with

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[53] *1962 Proceedings*, Section of Labor Relations Law, American Bar Association, at 14, 17 (1962). *See also NLRB v. Johnnie's Poultry*, 344 F.2d 617, 620 (8th Cir. 1965) (citing same statistics). Similarly, another researcher found:

> [o]nly when a union had cards from more than 60% of employees did it achieve at least an even chance of winning the election. Another interesting finding . . . is that an increase in the proportion of authorization cards collected over 70% did not substantially increase the union's chance of success. Unions with authorization cards from 90-100% of employees still won only 65.7% of the time.

Laura Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's Gissel Decision*, 79 Northwestern U. L. Rev. 87, 119 (1984).

[54] William N. Cooke, *Determinants of the Outcomes of Union Certification Elections*, 36 Indus. & Lab. Rel. Rev. 402, 403-04 (April 1983).

[55] *Id*.; *see also* Solomon E. Asch, *Social Psychology* (Prentice-Hill 1952) (considered one of the classic works on group conformity); Timothy P. Summers et al., *Voting For and Against Unions: A Decision Model*, 11 Acad. Mgmt. Rev. 643, 650 (1986) (noting that "pervasive impact of group norms on individual attitudes and behavior has been well documented"). Hoyt Wheeler and John McClendon found that

> Individual workers' perceptions of how … others wanted them to vote has been found to have had a significant effect on their voting intentions, and individuals who identified social forces favoring unionization were found to be more likely to vote for a union.

Hoyt N. Wheeler, John A. McClendon, *The Individual Decision to Unionize*, *The State of the Unions* 63-64 (Strauss, Gallagher, Fiorito, eds., Industrial Relations Research Association 1991) (citations omitted).

the union organizer or a co-worker. The conversation between the employee and union organizer is understandably one-sided; thus, all of the facts and arguments concerning union representation and collective bargaining are not presented. Discussing the importance of secret-ballot elections, former NLRB Member Higgins wrote:

> [w]ith particular respect to secrecy, the vote in a manual election stands in the privacy of the voting booth. No one can see how he or she votes. . . . Even if the employer and union have no coercive presence, there is still a need for secrecy. Elections are often highly charged events, and an employee should be free to vote in the privacy of the booth, away from prying eyes of any person.[56]

The recent events at a Federal-Mogul Corporation facility in Greenville, Michigan exemplify how employees may vote one way in a public forum and entirely differently when allowed to express their preferences in a private forum. Six days after unit employees at Federal-Mogul rejected a contract offer in a public "stand-up" vote by a margin of 160 to 22, the same employees ratified a similar contract in a secret ballot election by a margin of 103 to 89. Workers said the contract was largely the same as the one they had overwhelmingly rejected in the stand-up vote six days earlier. UAW Regional Director Don Oetman acknowledged that, the public stand-up vote was controversial when he expressed concern over the validity of the result and said a secret ballot may have to be used. A member of the bargaining unit agreed, "I believe in the democratic process. Everyone has to make their own decision and not be swayed by peer

[56] *London's Farm Dairy, Inc.*, 323 NLRB 1057, 1059 (1997) (Member Higgins dissenting) (discussing problems inherent in mail ballot elections); *cf. Brooks v. NLRB*, 348 U.S. 96, 99-100 (1954) (noting that a decertification petition in which "the influences of mass psychology are present – is not comparable to the privacy and independence of the voting booth").

pressure." He went on to state that the secret ballot election made things "a little more fair this time."[57]

Even union supporters admit to the superiority of secret ballot elections – at least in decertification elections. At a June 2002 hearing before the U.S. Senate Committee on Health, Education, Labor and Pensions, Kenneth Roth of Human Rights Watch stated that "[c]learly, in an ideal world, secret-ballot elections would be preferable to [card checks]."[58] In their joint brief to the Board in *Chelsea Industries* and *Levitz Furniture Co.*,[59] the UAW and the AFL-CIO argued that employee signatures on a decertification petition were not as reliable as a secret ballot election. Labor criticized petitions and cards as "not comparable to the privacy and independence of the voting booth" and further argued that the secret ballot "election system provides the surest means of avoiding decisions which are the result of group pressures and not individual decision[s]."[60]

The historical basis and rationale for the "recognition bar doctrine" was that it "operate[d] to prevent an employer from delaying the bargaining process in the hope that such a delay [would] undermine a union."[61] Obviously, in those cases where the union

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[57] *See* Ben Cunningham, *Workers Reverse Vote, Accept Cuts*, Grand Rapids Press (June 20, 2004).

[58] *See Workers' Freedom of Association: Obstacles to Forming a Union*, Hearing before the Committee on Health, Education, Labor and Pensions, U.S. Senate (June 20, 2002).

[59] Joint Brief of the United Automobile, Aerospace and Agricultural Implement Workers of America, the United Food and Commercial Workers, and the AFL-CIO in *Chelsea Industries* and *Levitz Furniture Co. of the Pacific, Inc.*, Nos. 7-CA-37016 and 20-CA-26596 (May 18, 1998).

[60] *Id*. (internal citation omitted).

[61] *MGM Grand Hotel, Inc.*, 329 NLRB 464, 469 (1999) (Member Hurtgen dissenting).

and employer have signed a pre-recognition "neutrality/card check" agreement "that principle has no relevance."[62] This is precisely the situation before the Board in the instant cases. It now is time to recognize "neutrality/card check" agreements for what they are – particularly given the reality of today's organizing environment. Otherwise, employers and unions will continue to "slam an iron gate in the face of . . . employees whose only request is that the Board allow them access to [the Board's] crown jewel, a Board supervised secret-ballot election."[63]

IV. RECONCILING THE TENSIONS AND ISSUES IN THE CONTEXT OF THE NLRA

The new dynamics of labor relations was not contemplated by the NLRA or the Board. The unions' involvement of employers, albeit through coercion and extortion, in a collusive effort to enhance union membership at the expense of employee rights, is a completely new wrinkle in labor relations. This new dynamic allows unions to achieve their objective of quickly and effortlessly increasing membership, and permits employers to save themselves from the unions' unmerciful attacks. Yet, it is completely devoid of any concern for the rights, feelings, and desires of the employees. The "neutrality/card check" agreement is a very clever, Machiavellian gimmick that assures the union success in obtaining a card majority and recognition – even with a group of employees that never felt the need or desire for union representation. And, under the Board's current rules those employees are prevented from obtaining a secret ballot referendum to determine if the so-called "card majority" is truly an uncoerced representative majority of the

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[62] *MGM Grand*, 329 NLRB at 469.

[63] *MGM Grand*, 329 NLRB at 474.

employee group. Fairness, free choice, industrial stability, employee Section 7 rights, and both the Act's purpose and the Board's mission are being sacrificed at the altar of the unions' self-interested desire to increase membership.

This new dynamic is totally out of sync with fundamental principles of American democracy, at odds with the purposes and policies of the Act, and contrary to every concept of fundamental fairness. This is certainly not the result that Congress ever envisioned when it enacted the NLRA. Clearly, it is time for the Board to examine this situation closely and fashion appropriate rules that will properly protect employee Section 7 rights, ensure fairness and the dignity of the individual, and provide stability to American labor relations.

The Board clearly has the authority to make these necessary changes, as well as the responsibility to protect employee Section 7 rights in cases of voluntary recognition to ensure that only unions supported by truly uncoerced majorities are being recognized by employers.[64] If the Board fails to take action to stop unions from continuing to flaunt the Act's provisions and Board's procedures, the respect, confidence, and trust in the Act and the Board will be seriously undermined, and render both the Act and the Board irrelevant to this new dynamic of labor organizing in America.

A. Concerns in All Cases of Voluntary Recognition

The rampant proliferation of abuses of employee rights by unions and some employers in recent years through such "neutrality/card check" agreements demonstrates that it is time for the Board to act. The Board needs to reign-in the kind of secretive,

[64] *See* Section III (B), *supra; see also Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961) (employer violates the Act by recognizing a union that does not represent an uncoerced majority of employees).

conspiratorial actions of unions and employers that are present in the cases at hand – actions designed to foist union representation on employees regardless of their true desires. This cavalier disregard of employee rights guaranteed under the NLRA undermines and erodes the integrity and relevance of the Board and the Act. The Board should use this opportunity to eliminate or modify the recognition bar doctrine to allow for employee-filed election petitions in *all* cases of "voluntary" recognition through an NLRB conducted secret ballot election – the best and only truly reliable method for determining uncoerced majority support. [65]

In all cases of voluntary recognition there is reason for the Board to be circumspect. This concern is rooted in the knowledge that the safeguards the Board provides employees in a traditional secret ballot election simply do not exist in cases of voluntary recognition. Moreover, both the union and employer no doubt had plenty of opportunity to engage in actions that could have tainted the uncoerced nature of the union's supposed majority support. By barring any election following voluntary recognition, the Board is effectively denying employees an adequate remedy if the recognition truly does not reflect an uncoerced majority of support in an appropriate unit.

The recognition bar doctrine is not required by the Act. Rather, it is a function of Board policy – a policy that currently works to protect the interests of unions and employers, but not employees. The primary goal of the Act and the NLRB, however, is to protect *employee* rights, not the rights of unions or employers. Consequently,

[65] Congress has entrusted the Board with a wide degree of discretion in adopting procedures to ensure that employees have a free and fair choice in selecting union representation. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946).

"voluntary recognition" should never be given the same "election bar" quality as certification following a Board-conducted secret ballot election.[66]

1. Determining the Existence of an Uncoerced Majority

Without a secret ballot election, there simply is no way of knowing whether an uncoerced majority of employees have in fact selected union representation. Thus, in cases of voluntary recognition, there is no Board "certification" – because the Board has no way to "certify" that the employer actually recognized a union that in fact enjoys uncoerced majority support. In cases of voluntary recognition it is solely up to the union and employer to agree in the first instance that voluntary recognition is proper and appropriate.

Both of the instant cases involve decertification petitions filed just weeks after the respective employers voluntarily recognized the UAW pursuant to "neutrality/card check" agreements. (Bd. Order at 2). The simple showing of interest in support of these petitions clearly calls into question the efficacy of the card checks in these cases as accurate means for determining uncoerced majority support.

2. Employees Become Trapped with No Access to the NLRB's Election Processes

By giving voluntary recognition the same "election bar" quality as in a Board certified unit, employees are trapped with no opportunity to make their choice of representation in a secret ballot election. This is critical since Board-conducted secret

[66] While this procedure could be limited to cases where the union and employer had a pre-existing "card check" agreement in place, such restriction would place an undue burden on the Regional Offices to determine by investigation or hearing if an agreement (written or verbal) actually existed prior to accepting and processing the petition. The Board should have concerns regarding the uncoerced nature of all card majorities in situations of voluntary recognition, and this procedure would be simpler for the Agency to administer.

ballot elections provide employees the best opportunity to make a decision about union representation under laboratory conditions that allow for true freedom of choice.[67] By giving voluntary recognition – a private process that operates outside the Board's established procedural safeguards and scrutiny – "election bar" status, the NLRB risks allowing unions to manipulate events to achieve their institutional objectives of gaining additional members at the expense of employee rights.

3. The Appropriateness of an "RC" Election

Because voluntary recognition does not include any of the Board's election safeguards, there always will be doubt as to the uncoerced majority support for the union – unless the Board conducts a secret ballot election. As such, it is imperative that *any* employees who wish to test the union's purported majority status be allowed to petition the Board for an election. An "RD" election is *only* appropriate in situations where a union has been properly certified as the representative of an uncoerced majority. The proper election petition and case handling procedures for resolving the question concerning representation raised by the union's demand for recognition would be an "RC" petition. By following the processes for an "RC" case, the Board will be able to define the appropriate bargaining unit and eligible voters. This is essential to avoid the outrageous and unfair unit gerrymanding that is present in the Metaldyne case. (Yost Decl.) It also would provide greater stability and predictability in the labor relations environment.

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[67] It is the Board's responsibility to ensure these laboratory conditions are preserved. *See General Shoe Corp.*, 77 NLRB 124, 127 (1948) ("In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled.")

4. The Appropriate Showing of Interest

While the Board's current procedures for "RC" and "RD" petitions require a 30 percent showing of interest, there is no logical reason why an employee-filed petition in an uncertified unit could not be supported by a smaller percentage of employees – or even by one employee. Thus, in cases of voluntary recognition, where both the union and employer allege the existence of majority support for the union, it is only fair that if *any* group of employees (or an individual employee) want the uncoerced nature of the alleged majority status tested in a Board-conducted secret ballot election, they (or he/she) should be entitled to petition such an event. Any disruption such an election might have on the union and employer's nascent relationship could be mitigated by imposing a 60-day waiting period between the date the employer issues its "intent to recognize" and the date the recognition becomes effective. If an election petition is filed during this 60-day period by one or more employees, the Board will process the petition to an election. Since the union has not yet been "officially" recognized at that time, there would be no duty to bargain during this 60-day period. If the parties did begin bargaining, they would do so at their own risk. However, any agreement reached during this period would not block an election.

5. Special Concerns in Voluntary Recognition Cases Where There is a Pre-Existing "Neutrality/Card Check" Agreement

It is clear that the drafters of the Act never envisioned today's landscape of corporate campaigns and coerced "neutrality/card check" agreements between unions and employers before the union is ever on the scene – agreements that effectively force a pre-

selected union on employees through public card signing, while denying them the right to vote in a secret ballot election.

a. The Trap for Employees is More Prevalent

"Voluntary" recognition based on today's "neutrality/card check" agreements does not allow for employee free choice. Instead of the protections offered by the Board's secret ballot election process, under today's "neutrality" agreements uninformed employees publicly sign authorization cards after being pressured, misled, or even threatened and coerced to do so. "Good faith" recognition – which is a presumptive requirement under the current recognition bar doctrine – does not and cannot exist in the wake of these agreements that predestine employees to support a preferred union based on joint employer and union pressure.

In cases like the ones before the Board, unions are using a perverted combination of voluntary recognition and the recognition bar doctrine to distort the process to the point that a union's organizing success is virtually a foregone conclusion. In these cases, employee freedom of choice has been tossed out the window. Instead of creating an environment in which employees can exercise their Section 7 rights to freely select a representative of their own choosing, unions (in complicity with employers) have arrogantly disregarded the dictates of the Act, purposefully herded the employees toward their institutional objectives, and snared them in a carefully crafted, escape-proof trap.

b. Action Required by the Board

The remedy for the evils highlighted by the facts of these cases and the clear threat they pose to employee rights is simple, straightforward, and easy to administer and police. That is, provide any employees with an opportunity to petition for a secret ballot

election any time they are unhappy with their employer's decision to voluntarily recognize a particular union as their representative based on a showing of majority support garnered in any manner outside of the NLRB's secret ballot election process.

Thus, should a union and employer collaborate to get employees to sign authorization cards and the employer then recognize the union on the basis of that supposed showing of "majority support" (as occurred in the cases at bar), *any* employees in the bargaining unit could obtain an "RC" election to test or confirm the uncoerced nature of the union's majority status. This would be the same procedure in all cases where an employer recognizes a union on the basis of cards.

In many cases, especially where employees sought out a union on their own and freely and voluntarily signed its authorization cards, employees would not object to their employer's recognition of the union as their representative. Such truly voluntary recognition based on properly executed, uncoerced authorization cards can be an appropriate and legitimate method for employees to choose their representative. In situations where the facts are like those in the instant cases, however, providing at least a reasonable window of opportunity for employees to seek a Board-conducted secret ballot referendum on their selection of a representative is not only appropriate, but absolutely essential to ensure the integrity of their rights guaranteed by Section 7. If the current state of affairs is allowed to continue, the Board will be rewarding unions for flaunting the Act and rendering hollow the Section 7 rights of employees to freely and fairly decide if they wanted a particular union to represent them – without coercion, intimidation, harassment, group pressure, fear of retaliation, or any of the other evils that can arise in a group meeting or one-on-one context.

c. Some Special Concerns

As the instant cases demonstrate, unions and employers have a dismal record of disregarding and trampling employee rights in cases where a "neutrality/card check" agreement is in place. Because of this history of abuse, special measures should be put into place that will help better protect employee rights. Thus, the text of any authorization cards that the union intends to use for purposes of voluntary recognition should clearly and unambiguously explain that: 1) the union and employer previously entered into a "neutrality/card check" agreement that requires the employer not to disparage the union or interfere with the union's organizing activities; and 2) the employer has agreed to recognize the union solely on the basis of a showing of cards representing a majority of the employees – and this recognition will be without an election. The key is to give employees reasonable, clear notice of the finality of the card before they sign it.

In addition, at the same time the authorization card is given to or solicited from an employee, the union also should be required to give the employee a "revocation card" designed to provide the employee with an easy method of revoking their previously signed authorization card. The text on this revocation card should clearly and unambiguously explain how the revocation process works, and that revocation of the authorization card will be effective upon mailing to either the union or the employer.[68]

This procedure would permit employees who initially were pressured into signing authorization cards to reflect on their decisions, investigate the facts on their own, and if they so desire, change their minds in the privacy of their home, car, etc. While these

[68] Alternatively, these revocation procedures could be included on the authorization card provided the union gives the employee a copy of the authorization card after it is signed.

revocation procedures admittedly are not a substitute for giving all employees in every case the opportunity to vote in a secret ballot election, they will create a somewhat better chance that the card majority presented to the employer by the union will be uncoerced, thereby reducing the instances of an employee-filed election petition subsequent to recognition.[69]

V. CONCLUSION

For all of the reasons set forth above, the Board should eliminate the recognition bar doctrine in cases of voluntary recognition and use its decision in this case to announce new "RC" procedures for employees to petition for a Board-conducted secret ballot election following any voluntary recognition, and adopt such other proposed changes and solutions as set forth herein as are appropriate to effectuate the purposes and policies of the Act.

[69] It should be noted that abuse of employee rights can occur in any card signing activity – it is not a phenomenon limited only to card signing following a pre-determined "neutrality/card check" agreement. While an argument certainly could be made that a clearly defined revocation procedure should apply to any situation where a union is obtaining signatures on authorization cards, the abuses demonstrated in the cases presently before the Board are so egregious that the situation dictates the imposition of this remedy. Should the Board conclude that this process improves the protection of employee rights generally in cases where a union is recognized based on a pre-existing card check agreement, this revocation card procedure could be extended to all cases where a union uses authorization cards to seek voluntary recognition.

Respectfully submitted,

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JAY W. KIESEWETTER
JONATHAN E. KAPLAN
TANJA L. THOMPSON
Kiesewetter Wise Kaplan
Schwimmer & Prather, PLC
3725 Champion Hills Drive, Suite 3000
Memphis, Tennessee 38104

Attorneys for Amicus Curiae
Associated Industries of Kentucky

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of July, 2004, true and correct copies of the foregoing Brief *Amicus Curiae* of Associated Industries of Kentucky were served via Federal Express upon:

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570-0001

Gerald Kobell, Regional Director
National Labor Relations Board
Region 6
1000 Liberty Avenue
Pittsburgh, PA 15222-4173

Frederick J. Calatrello, Regional Director
National Labor Relations Board
Region 8
Anthony J. Celebreeze Federal Building
1240 East 9th Street, Room 1695
Cleveland, OH 44199-2086

William L. Messenger
Glenn Taubmann
National Right to Work
Legal Defense Foundation
8001 Braddock Road, Ste. 600
Springfield, VA 22160

Allison Miller
Dana Corp. Coupled Products
500 Raybestos Drive
Upper Sandusky, OH 43351

Gary M. Golden
Dana Corp. Law Department
1796 Indian Woods Circle
Maumee, OH 43537

Seanna D'Amore
Metaldyne Corp. (Metaldyne Sintered Prods.)
West Creek Road
P.O. Box 170
St. Mary's, PA 15857

James M. Stone
David E. Weisblatt
McDonald Hopkins Co., LPA
2100 Bank One Center
600 Superior Avenue
Cleveland, OH 44114-2653

Betsy A. Engel
International Union, UAW
8000 E. Jefferson Avenue
Detroit, MI 48214

Wendy Fields-Jacobs
Organizing Department
International Union, UAW
8000 E. Jefferson Avenue
Detroit, MI 48214

Stanley J. Brown
Susanne Harris Carnell
Hogan & Hartson
8300 Greensboro Drive
McLean, VA 22012

_____
JONATHAN E. KAPLAN

Attorney for Amicus Curiae
Associated Industries of Kentucky